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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	
and Southwestern Bell Communications	)	CC Docket No. 97-121
Services, Inc. d/b/a Southwestern Bell	)	
Long Distance for Provision of In-Region	)	
InterLATA Services in Oklahoma	)	
	)	

Comments of the

Competition Policy Institute

on the

Motion to Dismiss and Request for Sanctions

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April 28, 1997

INTRODUCTION AND SUMMARY

The Competition Policy Institute (CPI) hereby comments on the Motion filed by the Association of Local Telecommunications Services (ALTS) to dismiss the Application by SBC Communications, Inc. (SBC) to provide in-region, interLATA service in Oklahoma.[1] CPI does not comment at this time on whether or not SBC has implemented the competitive checklist or whether or not Brooks Fiber is actually serving business and residential customers using its own facilities. As requested by the Federal Communications Commission (FCC) in the Public Notice, CPI offers these comments solely concerning the issue of whether SBC may apply for in-region, interLATA entry under section 271(c)(1)(B), the so-called "Track B".

SBC's application fails even to make a colorable argument that Track B is available to it. Except for making one sweeping generalization, SBC provides no legal analysis to support its claim that Track B even available to SBC. Moreover, SBC's application fails to satisfy Track B on its face, regardless of how the FCC interprets the language in subparagraph (B), including the term "such provider." Thus, the FCC should conclude that SBC does not satisfy Track B and does not need to resolve the question of when Track B applies.

If the FCC reaches the question of how to interpret the language in

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[1]Comments were requested on the ALTS Motion in a Public Notice issued on April 23, 1997, DA 97-864.

subparagraph (B), CPI believes that the only logical reading of the language in subparagraph (B) leads to the conclusion that Track B is not available to SBC in Oklahoma. CPI believes that a Regional Bell Operating Company (RBOC) is precluded from applying under Track B once it has received a single request from an unaffiliated provider of telephone exchange services for access and interconnection to the network facilities of that provider. To require a carrier to serve business and residential consumers using its own facilities before requesting access to the RBOC network would "put the cart before the horse". SBC has received requests for access and interconnection from at least sixteen and perhaps as many as forty-five unaffiliated providers of telephone exchange service. Thus, under the language of the Communications Act and SBC's own admissions, SBC cannot pursue an application under Track B.

As a result, if the FCC determines that SBC has not made a prima facie case that it has satisfied Track A, then the FCC should dismiss the SBC application for not meeting the preliminary grounds for consideration under either Track A or Track B. A dismissal is necessary to discourage frivolous applications in the future.

CPI believes that the FCC should also consider why SBC submitted this faulty application. CPI suggests that SBC may have submitted this application, expecting that it would be denied, solely to pursue a constitutional challenge to the Telecommunications Act of 1996. In its application, SBC suggests that it will file an action in court claiming that section 271 of the Communications Act is an

unconstitutional bill of attainder and violates separation of powers and equal protection principles.[2] If SBC files an appeal of the FCC's denial of the Oklahoma application, SBC would still be able to apply for interLATA relief in other states in which SBC may have a stronger case. If this is SBC's motivation, CPI respectfully suggests that the FCC should not allow SBC to use the process in this manner.

I. SBC FAILS TO PROVIDE A COHERENT LEGAL THEORY TO JUSTIFY ITS APPLICATION UNDER TRACK B.

SBC's application fails to provide a coherent legal explanation of its position that SBC may apply under Track B. SBC asserts that Track B

> is available where no CLEC that is a qualifying, facilities-based telephone exchange competitor for purposes of subsection (A) "has requested" access and interconnection. . . To prevent interLATA entry under subsection (B), however, the requesting local competitor may not simply anticipate building facilities and seek interconnection in anticipation of that day. Rather, it must actually be "such provider" described in subsection (A). . . .
>
> Southwestern Bell thus may submit this application pursuant to subsection (B) if the Commission should find that: (1) No CLEC, including Brooks Fiber, qualifies as a facilities-based provider of business and residential local service within the definition of subsection 271(c)(1)(A); or (2) no CLEC so qualified prior to the 3-month filing "window" Congress provided in subsection (B); or (3) Southwestern Bell otherwise complies with the requirements of subsection (B). [emphasis added]

As an initial matter, CPI finds it difficult to make sense of the final paragraph quoted above. CPI is uncertain whether SBC meant to use "and" instead of "or", or whether words were inadvertently added or dropped.

The confusion in the last paragraph is critical because the earlier paragraph does nothing more than set up the key question. As SBC correctly indicates, Track B

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[2]See Footnote 9, p. 8 of the Application.

does not apply once SBC receives a request from "such provider" (except in two narrow circumstances). SBC's application, however, does not provide an explanation of that term.[3] SBC's failure to articulate a legal interpretation of the term "such provider" demonstrates a surprising lack of attention to this critical issue.

II. EVEN IF TRACK B IS THEORETICALLY AVAILABLE, SBC FAILS EVEN TO ALLEGE THE FACTS NECESSARY FOR THE FCC TO CONSIDER ITS APPLICATION UNDER TRACK B.

Assuming, *arguendo*, that SBC's application provides a coherent interpretation of the term "such provider" and that the FCC finds that Track B is available, SBC's application still does not meet the preliminary grounds for consideration under Track B. In order to trigger Track B, SBC must at least allege that it has never received a request for access and interconnection from "such provider". SBC never makes this allegation. In fact, SBC cannot make this allegation, because it indicates elsewhere in its application that it has received at least five requests from facilities-based providers. SBC's inability to make a prima facie argument that Track B applies is sufficient grounds for the FCC to dismiss SBC's Track B claim.

Whatever interpretation is given of the term "such provider", it is clear that it only takes <u>one</u> request for access and interconnection from "such provider" to

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[3]The application quotes a floor statement of Rep. Tauzin indicating that "such provider" refers back to "the exclusively or predominantly facilities based [local service] provider described in subparagraph (A)". Even if Rep. Tauzin's statement were regarded as the definitive legislative interpretation of Congressional intent, Rep. Tauzin's statement does not answer many of the key questions. For instance, must the requesting carrier have facilities at the time it makes its request or afterwards? Does the term "provider" refer to any carrier or only a carrier providing a certain type of service?

eviscerate Track B. Subparagraph (B) states

> (B) FAILURE TO REQUEST ACCESS.--A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) . . . .

In other words, if a single "such provider" requests access and interconnection described in subparagraph (A), then SBC cannot, except in two narrow cases, pursue an application under Track B.

SBC's application indicates that Southwestern Bell Telephone (SWBT) "has received 45 requests for local interconnection and/or resale in Oklahoma".[4] If a single one of these 45 requests was initiated by a carrier that qualifies as "such provider" and was for the type of access and interconnection described in subparagraph (A), Track B does not apply. Thus, for SBC's application to establish a prima facie case under Track B, SBC must at least allege that not a single one of these 45 requests is for access and interconnection described in subparagraph (A) from a carrier qualifying as "such provider". Furthermore, SBC should identify how many different companies initiated these 45 requests and provide sufficient information for the FCC to determine whether each of these companies qualifies as "such provider" and whether each of these requests is for the access and interconnection described in subparagraph (A).

To CPI's knowledge, SBC has neither made this allegation nor provided this information to the FCC. SBC does not allege that none of the companies initiating these 45 requests for interconnection are "such provider". Further, SBC has provided

[4]Application, p. 90.

the FCC with neither the full list of the carriers initiating these 45 requests nor information about these carriers or the type of access and interconnection they requested. Without this information, the FCC cannot even begin to determine whether SBC meets the requirements of subparagraph (B).[5] In fact, the only evidence provided in the application indicates that Track B is not available. SBC states that at least five of the carriers initiating the requests are facilities-based carriers, which implies that these five carriers would meet the definition of "such provider" even as SBC would prefer to define it.[6]

Thus, even if the FCC interprets the term "such provider" in a way that is favorable to SBC, the evidence that SBC provides in its own application indicates that it has already received a request from "such provider" and that Track B is thus unavailable to SBC. Stated differently, even if everything in SBC's application is accurate, SBC fails to allege that it meets the conditions for relief under Track B. By admitting that five facilities-based carriers have requested access and interconnection, the application indicates that Track B is not available even under SBC's interpretation of "such provider". The FCC must dismiss SBC's Track B claim on its face.

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[5]The application lists the 16 companies with whom SBC has reached an interconnection agreement but does not indicate whether these are the same companies that initiated the 45 requests for interconnection or whether there are several other companies that have also requested interconnection with whom SBC has not reached an interconnection agreement. The application notes, for instance, that 23 companies have applied for certificates of public interest, convenience and necessity to provide local exchange service since February 8, 1996. Application, p. 90.

[6]"Five of SWBT's signed agreements provide interconnection and access for the CLECs' facilities-based service." Application, p. 90-91.

III. SINCE THE TERM "SUCH PROVIDER" CAN ONLY HAVE MEANING IF IT REFERS TO AN UNAFFILIATED PROVIDER, SBC CANNOT FILE UNDER TRACK B BECAUSE IT HAS ALREADY RECEIVED SEVERAL REQUESTS FROM SEVERAL UNAFFILIATED PROVIDERS.

As discussed above, CPI believes that the FCC should dismiss the SBC Track B argument even without deciding at this point how to interpret the term "such provider". SBC fails to establish a prima facie case that Track B is satisfied.

Nevertheless, if the FCC reaches the issue of how to define "such provider" in this proceeding, CPI believes "such provider" must be defined narrowly as an unaffiliated provider of telephone exchange service, regardless of the type of facilities used or the type of subscribers served. Since SBC admits that it has received several requests for interconnection from unaffiliated providers of telephone exchange service, CPI believes that SBC cannot rely upon Track B and that SBC's application should be denied.

One way to determine the meaning of "such provider" is to examine the use of a similar term -- "such competing providers" -- in subparagraph (A). In the second sentence of that subparagraph, the term "such competing providers" is distinguished from the service ("such telephone exchange service") and from the type of facilities used ("either exclusively over their own telephone exchange service facilities . . . "). The word "such" in the phrase "such competing providers" appears to mean "unaffiliated". Since the word "such" should mean the same in subparagraph (A) as it means in subparagraph (B), subparagraph (B) simply requires an RBOC to receive a request for access and interconnection from an "unaffiliated provider." Clearly, as

SBC admits, it has received requests for interconnection from several unaffiliated providers.

Further, to read the term "such provider" in subparagraph (B) as referring to a facilities-based provider serving business and residential customers, as SBC implies, would "put the cart before the horse." Under this interpretation, a competitor would have to serve residential and business customers before submitting a request for access and interconnection. This interpretation is unreasonable. The Telecommunications Act of 1996 was founded upon the evidence and belief that competitors need to obtain access to the local telephone company's network before they will be able to serve residential and business customers. If Track B is available until a competitor already serving residential and business customers over its own facilities requests access and interconnection, Track B could be available forever because the competitor would have no need to obtain access and interconnection with the RBOC. This interpretation would make Track A meaningless.

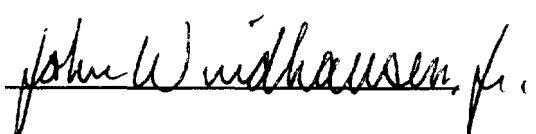
Finally, the purpose of Track B was to provide a mechanism for the RBOCs to obtain interLATA entry in those states where no competitor showed up. The legislation provides a mechanism, Track B, to allow the RBOCs to obtain interLATA entry in those states through the use of a statement of generally available terms and conditions. Now that competitors have indicated their desire to enter every state in the country by filing requests for interconnection, Track B is no longer available to any RBOC (unless one of the two limited exceptions is triggered).

IV. CONCLUSION

SBC's failure to articulate a coherent legal interpretation of subparagraph (B) and its failure even to allege the proper facts to establish a prima facie showing that Track B is available are fatal to SBC's effort to apply under subparagraph (B). Because of the many defects in SBC's application, the FCC can reach this conclusion even without coming to a decision on the correct legal interpretation of "such provider". If the FCC reaches the issue of how to define the term "such provider" in this proceeding, CPI urges the FCC to interpret "such provider" as "unaffiliated provider" as in the second sentence of subparagraph (A).

If the FCC finds that SBC has not made a preliminary showing that Brooks Fiber has met Track A, then there is no choice but for the FCC to dismiss SBC's application because the application, on its face, cannot sustain a Track B approach.

Respectfully Submitted,



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